

(1989) 07 SHI CK 0006

In the High Court Of Himachal Pradesh

Case No : Criminal Revision No. 482 of 1987

Barotiwala Paper Mills Pvt. Ltd. and Another

APPELLANT

Vs

Himachal Pradesh State Board for Prevention and Control of
Water Pollution

RESPONDENT

Date of Decision : 24-07-1989

Acts Referred:

Contempt of Courts Act, 1971 — Section 12

Criminal Procedure Code, 1973 (CrPC) — Section 151, 247, 249, 252, 252(1)

Penal Code, 1860 (IPC) — Section 114, 341, 380, 457

Water (Prevention and Control of Pollution) Act, 1974 — Section 25, 26, 27, 30, 41

Citation : (1989) 2 ShimLC 332

Hon'ble Judges : Bhawani Singh, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; Shyama Vasudeva, for the Respondent

Judgement

Bhawani Singh, J.—This petition u/s 482 read with Section 397 of the Code of Criminal Procedure has been moved for quashing the order dated 31-3-1987 of the Chief Judicial Magistrate as well as the proceedings pending in case No. 15/3 of 1984 under the Water (Prevention and Control of Pollution) Act, 1974 (hereinafter to be referred to as "the Act").

2. The facts, in brief, are that a complaint under Sections 33, 41, 42, 43 and 44 read with Sections 25, 26, 27 and 30 of the Act was initiated against the Petitioners by the H. P. State Board for Prevention and Control of Water Pollution. After the preliminary evidence was over, notices were issued to the Petitioners to appear in the case. On 20-4-1985, the complaint was dismissed for non-prosecution in the absence of the complainant and the Petitioners were discharged. On 22-4-1985, an application was moved on behalf of the Board for the Restoration/revival of the order dated 20-4-1985 by reviewing the same and in pursuance of this application, a notice was issued to the Petitioners for 20-4-1985 and as the Presiding Officer happened to be away, the case was listed on 10-5-1985 for which date notices were again sent to the Respondents.

Although the order of dismissal of the complaint was not specifically set aside on the case file, however, the proceedings continued and the Petitioners were represented by their Counsel on 9-8-1985, 9-9-1985, 17-10-1985, 16-11-1985, 31-1-1986, 12-5-1986, 2-8-1986, 16-8-1986, 6-9-1986, 27-9-1986, 16-10-1986, 3-1-1987, 21-1-1987, 12-2-1987, 31-3-1987, 21-4-1987, 30-4-1987. Ultimately when the case stood at the stage of charge, the present petition was moved by the Petitioners and stay of further proceedings in the case was ordered on 20-5-1987.

3. Sh. K. D. Sood, learned Counsel appearing for the Petitioners submits that the trial Court could not proceed with the matter when once the complaint had been dismissed for non-prosecution as the order amounted to that of acquittal and that the complaint could not be restored or revived in the absence of any specific power vested in the trial Court to review the order dated 20-4-1985. The learned Counsel further urges that the trial Court wrongly assumed that there was an implied power of review or restoration and that the Petitioners had consented not only to the same but also to the continuance of the proceedings from that stage onwards. In these circumstances, it is contended that the proceedings could not be continued and the result was that further proceedings in the matter were without jurisdiction and liable to be quashed by this Court.

4. In order to support his submissions, reference to 1986 Criminal Law Journal 1074 Bindeshwari Prasad Singh Vs. Kali Singh, has been made by Sh. K. D. Sood. In these judgments, the point whether in a warrant case which is non-compoundable and is not non-cognizable, the complaint could be dismissed and the accused discharged even without application of mind to the evidence collected was neither raised nor discussed nor decided.

5. In Bindeshwari Prasad Singh Vs. Kali Singh, S. Murtaza Fazal Ali, J., speaking for the Court said in Para 4 of the judgment:

...We, however, need not dilate on this point because there is absolutely no provision in the Code of Criminal Procedure of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. Code of Criminal Procedure does contain a provision for inherent powers namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of the Code of Civil Procedure, the subordinate Criminal Courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the Respondent was to move the Sessions Judge or the High Court in revision....

6. In 1986 Criminal Law Journal, 1074 (supra) the Supreme Court dealt with this matter quite exhaustively and it is fruitful to reproduce Paras 9, 10 and 11:

9. Section 249 of the Code of Criminal Procedure enables a Magistrate to discharge the accused when the complainant is absent and when the conditions laid down in the said section are satisfied. Section 256(1) of the Code of Criminal

Procedure enables a Magistrate to acquit the accused if the complainant does not appear. Thus, the order of dismissal of a complaint by a Criminal Court due to the absence of a complainant is a proper order. But the question remains whether a Magistrate can restore a complaint to his file by revoking his earlier order dismissing it for the non-appearance of the complainant and proceed with it when an application is made by the complainant to revive it. A second complaint is permissible in law if it could be brought within the limitations imposed by this Court in *Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar*, filing of a second complaint is not the same thing as reviving a dismissed complaint after recalling the earlier order of dismissal. The Code of Criminal Procedure does not contain any provision enabling the Criminal Court to exercise such an inherent power.

10. In *B.D. Sethi v. V.P. Dewan* (1971) 7 DLT 162, a Division Bench of the Delhi High Court held that a Magistrate could revive a dismissed complaint since the order dismissing the complaint was not a judgment or a final order. In Para 9 the Court observed as follows:

9. As long as the order of the Magistrate does not amount to a judgment, or a final order there is nothing in the Code of Criminal Procedure prohibiting the Magistrate from entertaining a fresh application asking for the same relief on the same facts or from re-considering that order. During the course of proceedings a Magistrate has to pass various interlocutory orders and it will not be correct to say that he has no jurisdiction to reconsider them....

We would like to point out that this approach is wrong. What the court has to see is not whether the Code of Criminal Procedure contain any provision prohibiting the Magistrate from entertaining an application to restore a dismissed complaint, but the task should be to find out whether the said Code contains any provision enabling a Magistrate to exercise an inherent jurisdiction which he otherwise does not have. It was relying upon this decision that the Delhi High Court in this case directed the Magistrate to recall the order of dismissal of the complaint. The Delhi High Court referred to various decisions dealing with Section 367 (old Code) of the Code of Criminal Procedure as what should be the contents of a judgment. In our view, the entire discussion is misplaced. So far as the accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the Code, a Magistrate cannot exercise any inherent jurisdiction.

11. For our purpose, this matter is now concluded by a judgment of this Court in the case of *Bindeshwari Prasad Singh Vs. Kali Singh*, We may usefully quote the following passage at page 126 (of SCR): at page 2433 of AIR):

...Even if the Magistrate had any jurisdiction to recall this order, it could have been done by another judicial order after giving reasons that he was satisfied that a case was made out for recalling the order. We, however, need not dilate on

this point because there is absolutely no provision in the Code of Criminal Procedure of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. Code of Criminal Procedure does contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of Code of Civil Procedure, the subordinate Criminal Courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had, absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the Respondent was to move the Sessions Judge or the High Court in revision. In fact, after having passed the order dated 23-11-1968, the Sub-Divisional Magistrate became functus officio and had no power to review or recall that order on any ground whatsoever. In these circumstances, therefore, the order even if there be one, recalling order dismissing the complaint was entirely without jurisdiction. This being the position, all subsequent proceedings following upon recalling the said order, would fall to the ground including order dated 3-5-1972, summoning the accused which must also be treated to be a nullity and destitute of any legal effect. The High Court has not at all considered this important aspect of the matter which alone was sufficient to put an end to these proceedings. It was suggested by Mr. D. Goburdhan that the application given by him for recalling the order of dismissal of the complaint would amount to a fresh complaint. We are, however, unable to agree with this contention because there was no fresh complaint and it is now well settled that a second complaint can lie only on fresh facts or even on the previous facts only if a special case is made out. This has been held by this Court in *Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar*. For these reasons, therefore, the appeal is allowed. The order of the High Court maintaining the order of the Magistrate dated 3-5-1972 is set aside and the order of the Magistrate dated 3-5-1972 summoning the Appellant is hereby quashed.

7. It is pertinent to see that the Supreme Court has observed that the Magistrate can discharge the accused when (1) the complainant is absent and (2) when the conditions laid down in the said section are satisfied. Let Section 249 of the Code of Criminal Procedure be reproduced:

249. Absence of complainant.-When the proceedings have been instituted upon complaint, and, on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

8. Here, under these provisions, before an accused can be discharged, it is necessary that:

- (a) the proceedings have been instituted upon a complaint;
- (b) the complainant is absent on any day fixed for the hearing of the case;

(c) the offence may be lawfully compounded; or

(d) is not a cognizable offence; and

(e) the Magistrate, in his discretion, may order the discharge of the accused before charge is framed.

9. In the present case, conditions (c), (d) and (e) are wanting. The offences in question are neither compoundable nor non-cognizable. The trying Magistrate while passing the order on 20-4-1985 has not given any reasons as to exercise of his discretion to discharge the Petitioners. It may be stated that the procedure to be followed in this case was that of the trial of a warrant case.

10. Miss Shyama Vasudeva, learned Counsel appearing for the Respondent, has strenuously contended that the absence of the complainant before the Court on that day was absolutely bonafide and genuine due to circumstances beyond the control of the Respondent. It is explained that the Counsel could not appear in the Court due to the fact that she could not spare herself from a case in the High Court upto 4.30 p.m. and the court could not be contacted for the adjournment of this case. It is further contended that the Asstt. Environment Engineer and the Junior Engineer who were authorised to appear in the Court, were on river monitoring duty at Chamba and the member-Secretary the complainant on behalf of the Board, was also on tour. On the merits of the application, it is asserted that the trying Magistrate should have adjourned the case looking to the important nature of the prosecution instead of discharging the Petitioners. The nature of the case was such that the learned Magistrate should have exercised discretion in not dismissing the complaint and postponing the matter. Above all, it is asserted that under these provisions, the complaint could not have been dismissed and the Magistrate was duty bound to call for the witnesses who had already been examined at the precharge stage. It is also submitted that in view of the provisions as aforesaid, the complaint could not be dismissed and the order dated 20-4-1985 was non-est and the further proceedings in the absence of any express order for restoration there-of though prayed specifically did not affect the merits of the case. In addition to this, the Petitioners had been participating in the proceedings on a number of occasion either in person or through lawyers, so, in the absence of prejudice the proceedings cannot be considered to be illegal.

11. Reference to AIR 1969 Raj 276 Bhatt Saihsh Kumar v. Sampat Mal Lodha and Anr. has been made. In this case Bhatt Sailesh Kumar filed a complaint on April 16, 1965, against Shri Sampat Mal Lodha and four others in the Court of Additional Munsif-Magistrate No. 1, Kotah, under Sections 457, 341, 380/114, I.P.C. It was registered on 3-2-1966. The complainant was present but on account of the absence of his Counsel he could not be examined. On March 23, 1966, he was present but due to his indisposition he could not be examined. On April 26, 1966, he was not present at the time when the case was put up and the Magistrate dismissed the complaint u/s 253 of the Code of Criminal Procedure for

want of evidence and the accused were discharged. In revision, the Sessions Judge observed that the case had been adjourned twice on account of the absence of the complainant and that on the third occasion also he remained absent. On this ground, he dismissed the revision petition and the matter came before the High Court of Rajasthan. In Para 2 of the judgment, the Court said:

...If there was no evidence against an accused, then there was a good ground for discharging them, but before it can be said that there was no evidence, it was incumbent upon the Magistrate to call and examine such witnesses as were alleged to have known the facts. This is a warrant case and offences under Sections 457, 341 and 380 read with Section 114, I.P.C., are cognizable and non-compoundable. The procedure for the trial of the case is laid down in Chapter XXI of the Code of Criminal Procedure. Section 252 Code of Criminal Procedure, requires the Magistrate to ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and then he has to summon, to give evidence before himself, such witnesses as he thinks necessary....

The Court further said:

Then comes Section 253, Code of Criminal Procedure, which provides in Sub-section (1) for discharge of the accused. Sub-section (1) lays down that if, upon taking all the evidence referred to in Section 252 and making such examination, if any, of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

Sub-section (2) of Section 253, Code of Criminal Procedure gives the Magistrate a large discretion for the discharge of the accused, if he considers the charge to be groundless. But he can only do this for reasons to be recorded. Here the only reason that the Magistrate has assigned is the absence of the complainant. I agree that the reasons need not be recorded in any particular form. It would be enough if the reasons, which motivated the discharge can be gathered from the order itself. But he must assign reasons in some form or the other.

In other words, there must be substantial material in the order to satisfy this Court that the discharge order passed by the trial Court was based upon sound and proper foundation. The only reason which can be gathered from the order is that the complainant was absent. But that is not the complainant's fault. The complainant submitted an application on April 26, 1966, at about 9 a.m., that as he was unaware of the morning hours of the Court, he could not put in appearance earlier. That apart, the absence of the complainant is not sufficient in cognizable and non-compoundable offences for the discharge of the accused.

There is difference between a summons case and a warrant case. In a summons case u/s 247, Code of Criminal Procedure if the complainant is absent, the accused can be acquitted, but in a warrant case, Section 259, Code of Criminal Procedure, would apply and the power to discharge the accused in the absence of

the complainant is not given in compoundable and non-cognizable cases The complaint filed by Shailesh Kumar for the offences under Sections 457, 341 and 380/114, I.P.C. is neither compoundable nor non-cognizable. Where the offence is neither compoundable nor non-cognizable, Section 259, Code of Criminal Procedure does not apply. It may also be mentioned here that where, as here, the absence of the complainant was due to reasonable cause the Magistrate ought not to have discharged the accused u/s 253(2), Code of Criminal Procedure.

12. The other judgment on which reliance has been placed is AIR 1929 Mad 260 O.S. Venkatasubba Ayyar v. T.N. Soundraraja Ayyangar, wherein the Petitioner was discharged because of complainant's absence. The complaint was then taken on again and the trial proceeded and it was urged that the same was illegal. The learned Judge was of the opinion that in such a case after the Magistrate discharges an accused because of the non-appearance of the complainant u/s 259 of Code of Criminal Procedure and subsequently excuses that non-appearance, he must proceed *denovo*. By this irregularity, the Court observed, the accused was not prejudiced.

13. After hearing the learned Counsel for the parties, I am of the opinion that the Magistrate has no power to review or restore the complaint dismissed due to the absence of the complainant. The remedy is either to file a fresh complaint on the same facts or to get the order of dismissal of complaint set aside by the court of Sessions or the High Court in exercise of revisional and/or inherent powers, as the case may be. It is also true that after the dismissal of the complaint further proceedings in the matter cannot be taken and if so taken, they are illegal and without jurisdiction but before these principles are applied, it is necessary to keep in view that the essential conditions as indicated in Para 9, and enumerated hereinabove, of 1986 Criminal Law Journal 1074 (*supra*) are established.

14. In addition AIR 1969 Raj 276 Bhatt Sailesh Kumar v. Sampat Mal Lodha and Anr. and 1978 CriLJ 203 K.K. Srivastava v. Ram Bilash, are also applicable.

15. The result, therefore, is that the order dated 20-4-1985 of the Judicial Magistrate is non-est as the same was not legally permissible and steps taken after the same without any specific order of restoration of the complaint were quite legal and *infra vires* of the jurisdiction.

16. The point, however, does not remain here in view of one more development. A Civil Contempt Petition No. 77 of 1986 was moved by the Respondent u/s 12 of the Contempt of Courts Act for wilful breach of the undertaking given by the Petitioners to the Court of the Chief Judicial Magistrate on 16-11-1985 for the completion of water treatment plant This matter was contested. In these proceedings an affidavit dated 3rd April, 1987 was filed by Subhash Chawla, Managing Director of M/s. Barotiwala Papers Pvt. Ltd. giving an undertaking and tendering sincere and unqualified apology with a prayer for forgiveness for failure to abide by the undertaking given to the Court of the Chief Judicial Magistrate,

Solan, and with further undertaking to this Court that the Factory will not be started until a certificate from the Board was obtained and the affluent treatment plant had been installed. This undertaking was accepted by this Court on 3-4-1987 in the following manner:

In view of the unconditional apology and the undertaking given in the affidavit dated April 3, 1987 filed by the Managing Director of the Respondent-company, which undertaking is duly accepted, the notice is discharged with no order as to costs.

17. In view of this examination of the matter by this Court, under the contempt jurisdiction, as well as taking into consideration the fact that these proceedings are continuing for the last many years and the factory is otherwise closed, I am of the opinion, that continuance of these proceedings, in these circumstances, is not at all appropriate and in the interest of justice. Therefore, in exercise of the powers u/s 482 Code of Criminal Procedure. I hereby quash the proceedings against the Petitioners in case No. 15/3 of 1984 titled H. P. Board of Prevention and Control of Water Pollution v. Ashwani Kumar and Anr.

18. In these circumstances the matter is accordingly disposed of.